fore be provident and abide by the Hague Rules by declaring the actual value of the goods if above £100 per package and having it written into the bill of lading. If he failed to do both then he would not get more than the £100 maximum in Article IV rule 5. Thus in *Pendle & Rivett Ltd.* v. *Ellerman Lines Ltd.*,[5] though the shipper had stated that the bale of silks and woollens was valued at £256 8s 1d but had failed to have the value inserted in the bill of lading, he recovered the maximum of £100 sterling only.

To hold otherwise would be to treat the Hague Rules and section 4 of the COGSO inoperative and to regard the carrier as bald bailees. But to apply the words of Lord Sumner in the *Elder Dempster's* case,[6] at page 564 which Lord Wright applied in his judgment in *Vita Food Products Inc.* v. *Unus Shipping Co.*[7] at page 300:

"There is not here a bald bailment with unrestricted liability or tortious handling independent of contract. Such a view would be a travesty of fact. Hence even on that footing, the respondent would fail, either because it was party to an illegality avoiding the contract or alternatively because the contractual exemptions could not be ignored."

Where no bill of lading has been issued but one is contemplated, the position is the same. *Per* Devlin J. in *Pyrene Co.* v. *Scindia Steam Navigation Co.*[8] at page 329:

"In my judgment whenever a contract of carriage is concluded and it is contemplated that a bill of lading will in due course be issued in respect of it, that contract is from its inception 'covered' by a bill of lading and is therefore from its inception a contract of carriage within the meaning of the Rules and to which the Rules apply."

The Supreme Court of Canada followed *Pyrene's* case in *Anticosti Shipping Co.* v. *St. Amand*[9] and applied the $500 per package limitation, although no bill of lading was issued. As Rand J. said so succinctly in delivering the opinion of the Supreme Court of Canada at page 358:

"The responsibility for seeing that the value of the thing shipped is declared and inserted on the bill is on the shipper and any consequential hardships must be charged against his own failure to respect that requirement."

It only remains to consider whether the invoice value provision in clause 13 of the bill of lading, *supra*, justifies the judgment that has been given in favour of the respondents. We have not been advised whether Hongkong has followed other countries in declaring an invoice value clause null. We understand Malaysia has not done so. But nevertheless the position is quite clear. This clause, in relation to the value of the missing bale, is not on the facts invalid under Article IV rule 5 since it does not reduce the carrier's liability to less than the per-package limitation, but it is contrary to Article III rule 8, being a "clause ... relieving the carrier or the ship from liability for loss ... otherwise than as provided in this Article," and therefore void. This clause cannot justify a judgment for the full invoice value and override the rules.

The appeal is allowed with costs here. The judgment of the High Court is set aside and substituted by one for £100 in gold for the respondents converted into Hongkong currency according to the rate of exchange prevailing on the day of arrival of the ship at Penang, in accordance with the provision of Article X of the Hongkong rules. Having regard to the arguments in the court below, we consider that the correct order, with regard to costs there, will be that each party do bear its own costs in the High Court.

Appeal allowed.

Solicitors: *Chandran & Co.; Shook Lin & Bok.*

TED BATES (M) SDN. BHD. v. BALBIR SINGH JHOLL

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J. and Abdul Hamid J.) March 20 and June 2, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 142 of 1976]

Practice and Procedure — Application to sign final judgment — Refund of deposit — Letter without prejudice — R.S.C. 1957, O. 14 & O. 32 r. 6.

Contract — Void contract — Restitution — Contracts Act, 1950, ss. 65, 66, 71, 74 & 76.

The appellants had applied for leave to sign final judgment against respondent for the sum of $250,000 being refund of deposit. The appellants alleged that the money had been given to the respondent to assist him to acquire certain premises in Kuala Lumpur. In return for the financial assistance the respondent had agreed to lease the premises to the appellants for a period of ten years, the money paid to be treated as advanced payments for the rental. Subsequently the appellants exercised their right to terminate the agreement and claim refund of the money they had paid. The respondent had admitted owing the money and asked for time to repay but his letter was not marked "without Prejudice". The Senior Assistant Registrar gave leave to sign final judgment under Order 32 r. 6 of the Rules of the Supreme Court but the order was set aside by the learned judge in the High Court. The appellants appealed.

Held: the application should have been dealt with under Order 14 and not under Order 32 rule 6. In the circumstances the proper order to be made would be that the respondent be given leave to defend conditional upon his paying into court the sum of $250,000.

Cases referred to:-

(1) *Gore* v. *Gore* [1964] M.L.J. 184, 186.

(2) *Hampden* v. *Wallis* (1884) 27 Ch. D. 251.

(3) *Ellis* v. *Allen* [1914] 1 Ch. 904.

(4) *Menaka* v. *Lum Kum Chum* [1977] 1 M.L.J. 91, 94.

FEDERAL COURT.

S.D.K. Peddie for the appellants.

C. Abraham for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (read by Wan Suleiman F.J., as judgment of the Court): This appeal is concerned with certain interlocutory proceedings. By a summons-in-chambers dated June 18, 1976 appellants applied for leave to sign final judgment against respondent for the sum of $250,000 being refund of deposit. It was clearly an application under O.14. However, after hearing counsel for appellants, the Senior Assistant Registrar gave leave to sign final judgment under O.32 r.6 which reads:—

"Any party may at any stage of a cause or matter, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the court or a judge for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other ques-

tion between the parties and the court or a judge may upon such application make such order, or give such judgment, as the court or judge may think just."

Respondent appealed, praying that the order be set aside and that unconditional leave be given to defend the action. In the grounds of judgment, the Senior Assistant Registrar stated she had made a mistake. She admitted she had not read respondent's affidavit which was handed to her at the hearing though filed earlier on. She believed she could entertain the application under O.32 r.6 on the oral application made by appellants' counsel. Although reference was made to O.32 r.6 in the notes of evidence they do not indicate any such application had been made. Having read respondent's affidavit she considered that the defence had raised *bona fide* triable issues as to matters of law and on facts. Consequently, the learned judge allowed the appeal and set aside the order made by the Senior Assistant Registrar. He issued a certificate under O.54 r.22A to the effect that he did not require further arguments in open court in respect of the matter.

Appellants attacked the decision of the learned judge on various grounds. It was alleged that the application was one under O.32 r.6. Also, he erred in law in holding that O.32 r.6 applied only when admissions appeared on the pleadings. As stated earlier, O.32 r.6 refers to admission "either on the pleadings, or otherwise." Further he misunderstood *Gore* v. *Gore*[1] where Thomson L.P. made the point that the case was not a suitable one to be dealt with under O.32 r.6 as it involved a question of law.

We agree with both Mr. Peddie and Mr. Abraham that the application should be dealt with under O.14 and not under O.32 r.6. They were of the view that the learned judge was misled into believing that the application was under O.32 r.6. Consequently, the application under O.14 was never dealt with by the lower courts.

Before the learned judge the notes of proceedings show Mr. Abraham as saying that respondent said transaction was not a lease as alleged by appellants but a loan to purchase property. Before this court he said it was a sale not a lease. A perusal of the record of appeal shows that it was not the policy of appellant company to own property in Malaysia. Appellants, therefore, negotiated with respondent whereby they would assist respondent financially to acquire the 4½ storey premises known as No. 281, Jalan Tuanku Abdul Rahman, Kuala Lumpur and to repair and construct an additional 2½ storeys to the premises. In return for the financial assistance respondent would lease the premises comprising 7 storeys to appellants for a period of ten years. The money so paid would be treated as advanced payment for the 10-year rental. Hence, the parties executed the Lease Agreement and the Supplementary Agreement at the same time in May 1975.

The agreements refer to $351,000 as having been paid by way of advanced payment when actually $250,000 was paid. Also, it cannot be disputed that respondent was only registered as owner of the said premises in June 1975. As the agreements were made before respondent became registered owner it was contended that there was no consideration. It was also said that the agreements were not registered under the National Land Code. Suffice to say that as between the parties non-registration does not affect their contract.

It is a fact that appellants paid $250,000 to Messrs. Skrine & Co., solicitors for the vendor of the said premises. Respondent denied he had ever received the money. Further, appellants paid $180,000 to Messrs. United Asian Bank Bhd. whereby respondent had to pay 90 monthly instalments of $2,000 without interest and to assign the monthly rental of $3,500 from appellants to the said Bank. Virtually, without putting out a cent, respondent became the owner of a 4½ storey premises. The trouble began when planning permission for the additional 2½ storeys was refused by the authority concerned. Without the additional 2½ storeys the premises would not be suitable for appellants so they exercised their right under the agreements by terminating the lease by notice in writing and respondent was to refund them $250,000. Respondent admitted owing the money and asked for time to repay. In a letter dated August 7, 1975, Messrs. Dulip Singh & Co. wrote to appellants and the second paragraph reads: —

"We are instructed to state that our client is making arrangements to repay the said sum of $250,000. However, he shall be pleased if you will kindly permit him to settle the said sum within a period of five years upon his undertaking to pay interest on the said sum at the agreed rate."

The learned judge considered that that letter should have been regarded as written without prejudice. With respect, we think he is wrong. This has no application to a case where a man says he owes another a certain sum but merely asks for time to repay the sum. The letter was not even headed without prejudice. How could a letter written in such a situation be said to be written under prejudice. The question of prejudice has no application unless a person is in dispute or negotiation with another at the time. In *Hampden* v. *Wallis*[2] although there was no formal admission in the pleadings or affidavits that a trustee had received and held the money he was ordered to bring the money into court upon admissions contained in letters written before action was brought that he had received the money. See also *Ellis* v. *Allen*.[3]

To return to respondent's contention that the transaction was a sale, not a lease it seems clear that the respondent had nothing to sell. The sale was certainly not between the parties. The bargains of the parties were set out in the agreements. There is nothing illegal or improper in the agreements made by the parties. The consideration is that respondent got the premises with the aid of appellants' money. There is force in appellants' contention that there is nothing to show appellants are liable under any contract so how could there be breach of any contract to make them liable for the counterclaim.

Respondent acquired the premises with the financial aid of appellants. What respondent is saying now is that "the agreements are void and not enforceable, therefore, I am going to keep the property and I do not have to pay the money lent:" In other words, he wants to have the cake and to eat it. Whether

the money is a deposit or a loan it is still recoverable. Suppose *A* owes *C* money. *A* asks *B* to pay *C*. *B* pays *C*. It would be ridiculous for *A* to say that he did not receive the money.

Section 66 of the Contracts Act, 1950, provides that where an agreement is discovered to be void, or when a contract becomes void any person who has received any advantage under such agreement or contract is bound to restore it, or make compensation for it, to the person from whom he received it. Apart from this, sections such as 65, 71, 74, 75 and 76 also produce the same result. As was held by the Privy Council in *Menaka* v. *Lum Kum Chum*[4] that the principle of section 66 was "a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation."

For the above reasons, the appeal should be allowed with costs. The proper order is that respondent be given leave to defend conditional upon his paying into court the sum of $250,000 within one month from today.

Appeal allowed.

Solicitors: *Skrine & Co.; Sarabjit Jholl.*

TAN KAH WICH & ORS. v. DATUK PHUA CHENG LEONG & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman F.J. & Abdul Hamid J.) March 20 & June 2, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 130 of 1978]

Administrative Law — Societies — Rules of Association — Meetings — Extraordinary general meeting — President purporting to adjourn meeting — Meeting continued by remaining members — Whether meeting can revoke decisions of General meeting and Committee — Power to elect new committee members — Declaration — Injunction to restrain — R.S.C. 1957, O. 25 r. 2.

Societies — Rules of Association — Extraordinary General Meeting called to discuss certain matters — Chairman adjourning meeting and leaving it — Whether members can decide to continue with meeting — Whether Extraordinary General meeting can revoke former decisions of Annual General Meeting and committee — Whether incumbent Committee or any of its members can be removed — Whether resolutions or any of them void.

This was an appeal from the decision of Abdul Razak J., reported at [1979] 1 M.L.J. 254. An extraordinary general meeting of the association had been called to discuss certain matters which had been decided by the Committee and Annual General Meeting, to pass a vote of no confidence in the incumbent committee and to elect fresh committee members. The meeting was adjourned by the Chairman while the first item was under discussion and he and a few members left the meeting. The other members decided to continue the meeting and resolutions were passed revoking the earlier decisions of the Committee and General meeting, expressing no confidence in the incumbent committee and electing fresh committee members. The learned trial judge held that the meeting which had been continued after the departure of the President was properly so continued but he held that the meeting had no power to pass the resolutions, which he declared null and void. He also granted an injunction to restrain the appellants from enforcing the resolutions or interfering with the respondents in their use or enjoyment of the offices of the Society. The appellants appealed.

Held: (1) the power to adjourn a meeting is at common law vested in the meeting itself and nothing in the Constitution of the Society invests the President with the power to adjourn the meeting at his whim and fancy;

(2) the Special General meeting which the remaining members continued after the President left was a valid meeting;

(3) although the meeting had power to revoke former decisions of the committee or General meeting and to adopt a motion of no confidence, it had no power to remove the Committee members;

(4) there was sufficient cause for the learned trial judge to make the declaration and grant the injunction he did and therefore the appeal must be dismissed.

Cases referred to:-

(1) *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 329 at p. 342.
(2) *Baker* v. *Jones & Ors.* [1954] 2 All E.R. 553.
(3) *Ken* v. *Wilkie* (1860) 1 L.T. 501.
(4) *Stoughton* v. *Reynolds* (1736) 2 Strange 1044.
(5) *National Dwellings Society* v. *Sykes* [1894] 3 Ch. 159.
(6) *Catesby* v. *Burnett* [1916] 2 Ch. 325.

FEDERAL COURT.

Mahinder Singh for the appellants.

Datuk Morris Edgar for the respondents.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the judgment of the Court): In the action of the court below the plaintiffs who claimed to be the legally appointed President and Committee Members of the Kuantan Kheng Chew Wooi Kuan Society (hereinafter referred to as the "Society") sought to obtain a declaration that (a) the resolution made by defendants purporting at the Special General Meeting to appoint themselves President and Committee Members of the Society was null and void and (b) an injunction to restrain defendants in such capacity from enforcing the said resolutions or interfering with plaintiffs in their use or enjoyment of the offices of the Society.

Defendants had earlier obtained an *ex parte* interim injunction to restrain the plaintiffs from acting as the office bearers of the Society.

The parties eventually agreed that since major issues of fact were not in dispute and that only questions of law were involved such questions could be decided in accordance with Order 25 rule 2 of the Rules of the Supreme Court, that no evidence would be called. Written submissions were subsequently filed.

The "Preliminary Issue" reads as follows:

"Whether the Special General Meeting of the 'Kuantan Kheng Chew Wooi Kuan' which was continued by the members after the President left it on October 30, 1977 was a valid meeting of the said association and even if such meeting was valid whether the Resolutions or any of them were valid."

It would appear that commencing from April 1977 twelve members of the Society had signed a requisition for a Special General Meeting to decide on the site of an electrical substation to service certain newly constructed shophouses owned by the Society. After three such requisitions and a letter from the Registrar of Societies asking 1st plaintiff to hold such meeting, the meeting was convened on October 30, 1977, and defendants circulated the following agenda to members: